IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
April 12, 2007 Session

RONALD TIMMONS v. METROPOLITAN GOVERNMENT OF NASHVILLE, DAVIDSON COUNTY, TENNESSEE

Appeal from the Circuit Court for Davidson County
No. 05C-137   Barbara Haynes, Judge

No. M2006-01828-COA-R3-CV - Filed on August 23, 2007

The trial court granted the municipal government summary judgment, dismissing a negligence claim under the Tennessee Governmental Tort Liability Act, Tenn. Code Ann. § 29-20-101 *et seq*. We reverse, finding there are issues of disputed fact surrounding the plaintiff's treatment by police officers which form the basis of his negligence claim.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Reversed

PATRICIA J. COTTRELL, J., delivered the opinion of the court, in which WILLIAM B. CAIN and FRANK G. CLEMENT, JR., JJ., joined.

Steve North, Mark North, Madison, Tennessee, for the appellant, Ronald Timmons.

Sue B. Cain, Acting Director of Law; Kevin C. Kline; James Earl Robinson; John Lee Kennedy; for the appellee, The Metropolitan Government of Nashville and Davidson County.

OPINION

On January 14, 2005, Ronald Timmons sued the Metropolitan Government of Nashville and Davidson County ("Metro") for injuries arising out of his treatment by police after an automobile accident. Mr. Timmons, a diabetic, was involved in a minor automobile accident while he was suffering from diabetic shock. Without understanding Mr. Timmons' condition and believing he was intoxicated, the police officers forcibly removed Mr. Timmons from his car and restrained him, breaking his arm in the process. After Mr. Timmons was restrained, it was determined that his condition was related to diabetes and he was then treated accordingly.

Mr. Timmons sued Metro under the Tennessee Governmental Tort Liability Act, Tenn. Code Ann. § 29-20-101 *et seq.* ("TGTLA"), alleging the police officers "were negligent in failing to recognize that Mr. Timmons was in diabetic shock and that they were further negligent in using such force against a helpless and unconscious man as to cause a traumatic spiral, comminuted and displaced fracture of his arm." Mr. Timmons' complaint thus alleged two negligent acts: (1) failure to recognize his diabetic condition and (2) use of force that was not necessary given his condition.

Metro filed a motion for summary judgment seeking dismissal of both negligence claims.[1] According to Metro, it was entitled to judgment on the "failure to diagnose" claim "because the officers' actions were objectively reasonable." As for the second negligence claim regarding use of force, Metro argued it likewise fails because "(1) even if the plaintiff could show that the officers used excessive force (which he cannot), he cannot show that the Metropolitan Government was *negligent* in failing to prevent this use of force: and (2) given the circumstances, the officers' use of force was reasonable." These were the only grounds raised in Metro's motion. The trial court granted summary judgment to Metro without elaborating on its rationale.

Mr. Timmons appeals the trial court's order, arguing that there are genuine issues of material fact regarding the negligence of Metro's police officers which preclude summary judgment.[2] On the other hand, Metro argues summary judgment was appropriate for three reasons. First, according to Metro, judgment is appropriate on both negligence claims since the police officers "acted objectively reasonably." Second, Metro argues that the claims should be dismissed since the "gravamen" of the complaint is battery which is not sustainable under the TGTLA. Finally, Metro argues that the excessive force claim fails since Mr. Timmons must show that Metro itself is negligent and not just the police officers.

I. Standard of Review

A trial court's decision on a motion for summary judgment enjoys no presumption of correctness on appeal. *BellSouth Advertising & Publishing Co. v. Johnson,* 100 S.W.3d 202, 205 (Tenn. 2003); *Scott v. Ashland Healthcare Ctr., Inc.*, 49 S.W.3d 281, 285 (Tenn. 2001); *Penley v. Honda Motor Co.*, 31 S.W.3d 181, 183 (Tenn. 2000). We review the summary judgment decision as a question of law. *Finister v. Humboldt Gen. Hosp., Inc.*, 970 S.W.2d 435, 437 (Tenn.1998); *Robinson v. Omer*, 952 S.W.2d 423, 426 (Tenn.1997). Accordingly, this court must review the record *de novo* and make a fresh determination of whether the requirements of Tenn. R. Civ. P. 56 have been met. *Eadie v. Complete Co., Inc.*, 142 S.W.3d 288, 291 (Tenn. 2004); *Blair v. West Town Mall*, 130 S.W.3d 761, 763 (Tenn. 2004); *Staples v. CBL & Assoc.*, 15 S.W.3d 83, 88 (Tenn. 2000).

The requirements for the grant of summary judgment are that the filings supporting the motion show that there is no genuine issue of material fact and that the moving party is entitled to

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[1] Metro's motion stated it sought summary judgment for the reasons stated in its motion "and as discussed in more detail in the accompanying memorandum of law (which is incorporated herein by reference)." The memorandum, however, was not made a part of the record.

[2] Mr. Timmons also argues that Metro inappropriately relied on its own Answers to Interrogatories to support its motion for summary judgment. Since we believe genuine issues of material fact exist regardless of Metro's Answers, we need not address this issue.

judgment as a matter of law. Tenn. R. Civ. P. 56.04; *Blair*, 130 S.W.3d at 764; *Pero's Steak & Spaghetti House v. Lee*, 90 S.W.3d 614, 620 (Tenn. 2002); *Byrd v. Hall*, 847 S.W.2d 208, 210 (Tenn. 1993). Consequently, summary judgment should be granted only when the undisputed facts, and the inferences reasonably drawn from the undisputed facts, support one conclusion - that the party seeking the summary judgment is entitled to a judgment as a matter of law. *Webber v. State Farm Mut. Auto. Ins. Co.*, 49 S.W.3d 265, 269 (Tenn. 2001); *Brown v. Birman Managed Care, Inc.*, 42 S.W.3d 62, 66 (Tenn. 2001); *Staples*, 15 S.W.3d at 88.

In our review, we must consider the evidence presented at the summary judgment stage in the light most favorable to the non-moving party, and we must afford that party all reasonable inferences. *Doe v. HCA Health Servs., Inc.*, 46 S.W.3d 191, 196 (Tenn. 2001); *Memphis Hous. Auth. v. Thompson*, 38 S.W.3d 504, 507 (Tenn. 2001). We must determine first whether factual disputes exist and, if so, whether the disputed fact is material to the claim or defense upon which the summary judgment is predicated and whether the disputed fact creates a genuine issue for trial. *Byrd*, 847 S.W.2d at 214; *Rutherford v. Polar Tank Trailer, Inc.*, 978 S.W.2d 102, 104 (Tenn. Ct. App. 1998). "[I]f there is a dispute as to any material fact or any doubt as to the conclusions to be drawn from that fact, the motion must be denied." *Byrd*, 847 S.W.2d at 211.

To meet the requirements for summary judgment, a defendant moving for summary judgment must, in its filings supporting the motion, either affirmatively negate an essential element of the non-moving party's claim or conclusively establish an affirmative defense. *Blair,* 130 S.W.3d at 767; *Staples*, 15 S.W.3d at 88. If the moving party fails to meet this burden, the burden to come forward with probative evidence establishing the existence of a genuine issue for trial does not shift to the non-moving party, and the motion must be denied. *Staples*, 15 S.W.3d at 88-89.

If, however, the moving party successfully negates a claimed basis for the action or establishes an affirmative defense, the non-moving party may not simply rest upon the pleadings. *Staples*, 15 S.W.3d at 89. In that situation, the non-moving party has the burden of pointing out, rehabilitating, or providing new evidence to create a factual dispute as to the material element in dispute. *Staples*, 15 S.W.3d at 89; *Rains v. Bend of the River*, 124 S.W.3d 580, 587-88 (Tenn. Ct. App. 2003).

II. FACTS

The following facts are not disputed.[3] On the day of the incident, Mr. Timmons had dinner at his sister's home. While driving home, Mr. Timmons began to feel the symptoms of insulin shock. As a result of feeling these symptoms, Mr. Timmons stopped to get a candy bar and waited

[3]This recitation of facts is not disputed for purposes of the summary judgment motion. It also contains facts Mr. Timmons argues should not be included since they rely on Metro's Answers to Interrogatories. Even when we include these facts offered by Metro in support of its motion, there are, nevertheless, genuine issues of material fact still in dispute.

in the store parking lot for 15 minutes. After driving another 8 to 10 miles, Mr. Timmons again began to feel the symptoms of insulin shock, including sweating, nervousness, and shaking.

Shortly thereafter, Mr. Timmons was involved in an accident with another car. Fortunately, the accident was relatively minor with no resulting personal injuries. Mr. Timmon's car was still driveable. When Officer Thornton approached Mr. Timmon's car, he testified that Mr. Timmons did not respond when asked if he was injured but just looked at the officer. When requested to exit his vehicle by the police, Mr. Timmons again did not respond. The officers then ordered Mr. Timmons to exit his vehicle. While believing Mr. Timmons was intoxicated, the officers did not smell alcohol on Mr. Timmons.

Since Mr. Timmons did not respond to the order to exit the vehicle, the police officers forcibly removed him from the car. Exactly how this was accomplished and Mr. Timmons' behavior during the encounter are the subject of dispute. There also seems to be a dispute as to whether Mr. Timmons continued to be a threat, *i.e.*, whether the officers turned off the car and removed the keys. Due to his condition, Mr. Timmons' memory of the incident is quite limited. He remembers being in his car after the accident, being face down on the pavement while being handcuffed, being in the back of a police car and then being in an automobile. Mr. Timmons' arm was broken while he was being restrained and handcuffed. While some officers testified that during this process Mr. Timmons was actively resisting by kicking, etc., at least one officer testified in his deposition that Mr. Timmons did not resist and was passive.

After Mr. Timmons was under the police officers' control, one officer suspected that his condition could be medical rather than alcohol related. When medical staff determined his blood sugar was low, the police released him to medical staff for treatment, and he was ultimately taken to the hospital.

It is not disputed that Mr. Timmons suffers from Type 1 diabetes which can result in insulin shock when the sugar level in his bloodstream is too low. When suffering from insulin shock, an individual may appear to be drunk, including slurred speech and loss of motor skills.

In response to the motion for summary judgment, Mr. Timmons submitted the affidavit of an expert, Phillip L. Davidson. Mr. Davidson has a masters degree in Criminal Justice from Tennessee State University, a Ph.D. from Vanderbilt University in Education, and a law degree. He was a police officer with Metro for nine years, a professor of criminal justice for eight years and was Director of the Tennessee Law Enforcement Training Academy for three years. Mr. Davidson opined that the officers involved in this incident were negligent since they violated "recognized and proper procedures" for recognizing, handling, extracting and restraining impaired persons, which negligence caused Mr. Timmons' injury.

III. ANALYSIS

Mr. Timmons is presumably proceeding under the provision of the TGTLA that removes Metro's immunity for "injuries proximately caused by a negligent act or omission of any employee within the scope of his employment," with certain exceptions.[4] Once immunity is waived, liability of a governmental entity "shall be determined as if the governmental entity were a private person." Tenn. Code Ann. § 29-20-206.

A negligence cause of action has been distilled down to five necessary ingredients: (1) a legally recognized duty owed by the defendant to the plaintiff, (2) the defendant's breach of that duty, (3) an injury or loss, (4) causation in fact, and (5) legal cause. *Biscan v. Brown*, 160 S.W.3d 462, 478 (Tenn. 2005); *Draper v. Westerfield*, 181 S.W.3d 283, 290 (Tenn. 2005); *Foster v. Bue*, 749 S.W.2d 736, 741 (Tenn. 1988). The court in *Kelley v. Johnson*, 796 S.W.2d 155, 157 (Tenn. Ct. App. 1990), *overruled on other grounds by Carroll v. Whitney*, 29 S.W.3d 14 (Tenn. 2000) (noting contributory negligence no longer recognized in Tennessee), described the distinction between issues of fact and issues of law as follows:

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[4] Tenn. Code Ann. § 29-20-205 provides as follows in its entirety:

> Immunity from suit of all governmental entities is removed for injury proximately caused by a negligent act or omission of any employee within the scope of his employment except if the injury arises out of:
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> (1) the exercise or performance or the failure to exercise or perform a discretionary function, whether or not the discretion is abused;
> (2) false imprisonment pursuant to a mittimus from a court, false arrest, malicious prosecution, intentional trespass, abuse of process, libel, slander, deceit, interference with contract rights, infliction of mental anguish, invasion of right of privacy, or civil rights;
> (3) the issuance, denial, suspension or revocation of, or by the failure or refusal to issue, deny, suspend or revoke, any permit, license, certificate, approval, order or similar authorization;
> (4) a failure to make an inspection, or by reason of making an inadequate or negligent inspection of any property;
> (5) the institution or prosecution of any judicial or administrative proceeding, even if malicious or without probable cause;
> (6) misrepresentation by an employee whether or not such is negligent or intentional;
> (7) or results from riots, unlawful assemblies, public demonstrations, mob violence and civil disturbances;
> (8) or in connection with the assessment, levy or collection of taxes; or
> (9) or in connection with any failure occurring before January 1, 2005, which is caused directly or indirectly by the failure of computer software or any device containing a computer processor to accurately or properly recognize, calculate, display, sort, or otherwise process dates or times, if, and only if, the failure or malfunction causing the loss was unforeseeable or if the failure or malfunction causing the loss was foreseeable but a reasonable plan or design or both for identifying and preventing the failure or malfunction was adopted and reasonably implemented complying with generally accepted computer and information system design standards. Notwithstanding any other provision of the law, nothing in this subdivision shall in any way limit the liability of a third party, direct or indirect, who is negligent. Further, a person who is injured by the negligence of a third party contractor, direct or indirect, shall have a cause of action against the contractor.

> The determination of negligence claims involves mixed questions of law and fact. The existence and scope of the defendant's duty is exclusively within the court's domain. *Dill v. Gamble Asphalt Materials*, 594 S.W.2d 719, 721 (Tenn. Ct. App. 1979). However, whether the defendant breached its duty and whether the breach proximately caused the injury are generally questions decided by the trier of fact. *Frady v. Smith*, 519 S.W.2d 584, 586 (Tenn. 1974); *Senters v. Tull*, 640 S.W.2d 579, 582 (Tenn. Ct. App. 1982). These questions become questions of law only when the facts and inferences drawn from the facts permit reasonable persons to reach only one conclusion. *Evridge v. American Honda Motor Co.*, 685 S.W.2d 632, 635 (Tenn. 1985); *Haga v. Blanc & West Lumber Co.*, 666 S.W.2d 61, 65 (Tenn. 1984).

There are several factual issues that remain unresolved that are crucial to Mr. Timmons' negligence claims. Primarily, a factual issue remains regarding Mr. Timmons' response to the police officers, *i.e.* whether he was actively resisting them by fighting and kicking or whether he was passive. Mr. Timmons himself is unable to testify on this point. The testimonies of the officers on the scene differ significantly about Mr. Timmons' behavior and the degree to which he was restrained. Without a factual determination of Mr. Timmons' response to the officers, there is no basis upon which to determine whether the officers' conduct was reasonable. In addition, Mr. Timmons came forward with expert testimony that the officers violated standard protocol in their failure to recognize Mr. Timmons' medical problem and in how they extracted him from his car and restrained him. This also presents a factual question whether and to what extent the officers involved deviated from policies and procedures. For these reasons, we believe there exist genuine issues of material fact such that Metro is unable to negate an essential element of Mr. Timmons's claim, *i.e.*, that the duty owed to Mr. Timmons was not breached, which preclude the grant of summary judgment to Metro.

As a final point, Metro argues that the claim of negligence regarding force used by the officers is a battery claim which changes the posture of Mr. Timmons' suit under the TGTLA. In effect, Metro is raising an affirmative defense by arguing that Metro's immunity has not been waived under the TGTLA for intentional torts. Metro is correct that as a general rule a party may not recover under the TGTLA for intentional torts such as battery. Special circumstances present an exception to this rule. In *Limbaugh v. Coffee Medical Center*, 59 S.W.3d 73, 84 (Tenn. 2001), the Tennessee Supreme Court held that Tenn. Code Ann. § 29-20-205 removes immunity for injuries where the government entity is negligent and the injury arises from the commission of an intentional tort by one of its employees which is not listed in subsection (2), such as battery. *See Baines v. Wilson County*, 86 S.W.3d 575, 581 (Tenn. Ct. App. 2002). Metro argues that any claim regarding use of force by a police officer is a claim for battery and since that is an intentional tort, Mr. Timmons may not recover for this cause of action under the TGTLA. Furthermore, since Mr. Timmons has failed to allege that Metro was negligent, then the circumstance recognized in *Limbaugh* does not apply. Under *Limbaugh*, Metro cannot be held liable for an intentional tort committed by its employee absent negligence by Metro.

We decline to rule on this issue. First, Mr. Timmons' complaint alleges only simple negligence. He maintains that the police officers were negligent, among other reasons, in failing to perform a proper field investigation, extracting him from the car, and in how they cuffed him. He does not allege that the officer's physical contact itself was unlawful. It would be inappropriate to recharacterize his allegations. Second, as long as there exist genuine questions as to what actually occurred at the scene, trying to distinguish negligence and battery and then opine on the consequences of this differentiation would result in an advisory opinion.

The trial court is reversed. Costs of this appeal are taxed to the Metropolitan Government of Nashville, Davidson County, Tennessee.

PATRICIA J. COTTRELL, JUDGE